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IN THE

Supreme Court of the United States

October Term, 1947

No. 366

BAY RIDGE OPERATING CO., INC.,

Petitioner,

v.

JAMES AARON, ALBERT ALSTON, JAMES PHILIP BROOKS, LOUIS CARRINGTON, ALBERT GREEN, JAMES HENDRIX, AUSTIN JOHNSON, CARL I. ROPER, MARS STEPHENS and NATHANIEL TOLBERT.

No. 367

HURON STEVEDORING CORP.,

Petitioner,

v.

LEO BLUE, NATHANIEL DIXON, CHRISTIAN ELLIOTT, TONY FLEETWOOD, JAMES FULLER, JOSEPH J. JOHNSON, SHERMAN MCGEE, JOSEPH SHORT, ALONZO E. STEELE and WHITFIELD TOPPIN.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Opinions Below

The opinion of the District Court (R. 581-591) is reported at 69 F. Supp. 956. The opinion of the United States Circuit Court of Appeals for the Second Circuit (R. 654-659) is reported at 162 F. (2d) 665.

Jurisdiction

Jurisdiction is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

Question Presented

A collective bargaining agreement, executed after passage of the Fair Labor Standards Act, provided that:

> "3 (a) Straight time rate shall be paid for any work performed from 8 a.m. to 12 Noon and from 1 p.m. to 5 p.m., Monday to Friday, inclusive, and from 8 a.m. to 12 Noon Saturday.
>
> (b) *All other time,* including meal hours and the Legal Holidays specified herein, *shall be considered overtime* and shall be paid for at the overtime rates." (Italics supplied.)

The "overtime" hourly rate was in most cases 150% of the "straight time" rate (Find. 9, R. 595).

Respondents performed 80% of their work during the so-called overtime hours at overtime rates. In fact, some respondents were specifically hired to work at night and never worked at all during "straight time" hours or at "straight time" rates (Chart, R. 613; also R. 176).

Under the circumstances were the "straight time" rates "the regular rate of pay" at which respondents were employed?

Statute Involved

Section 7 (a) of the Fair Labor Standards Act of 1938 (June 25, 1938, c. 676, Sec. 7 (a), 52 Stat. 1063, 29 U. S. C. 207 (a)) provides, in part:

> "No employer shall * * * employ any of his employees who is engaged in commerce * * * for a workweek longer than forty hours * * * unless such employee receives compensation for his employment

in excess of * * * [forty hours] at a rate not less than one and one-half times the regular rate at which he is employed."

Statement

These two suits were brought for a number of plaintiffs under Section 7 (a) of the Fair Labor Standards Act (June 25, 1938, c. 676, Sec. 7 (a), 52 Stat. 1063, 29 U. S. C. 207 (a)) for overtime compensation earned by them as longshoremen in the Port of New York between October 24, 1938 and October 4, 1945 (R. 6, 13). By stipulations, the claims of the twenty respondents were severed from those of the other plaintiffs for immediate trial, and the other claims were left pending, to be controlled by the "legal rules and principles established by * * * final disposition of the severed actions" (R. 2-3, 544-549, 592-593).[1] It was also stipulated that respondents were engaged in commerce within the meaning of the Fair Labor Standards Act (R. 594).

This case is much simpler than the petition suggests. The statement therein refers freely to "the prevailing pattern in organized American industry", "shift differentials", statistical studies prepared by petitioners themselves and other matters which were not evidence. These economic data were received by the district court as "brief

[1] The twenty claims selected for immediate trial were chosen as representing what was thought to be every possible combination of work pattern—with respect to the variety of the cargo handled, the capacity worked, and the distribution of working time between contract "straight time" and contract "overtime" periods. It is these twenty claims which were adjudicated by the Court below. It is difficult to understand why petitioners stipulated to abide by the determination of these claims if, as petitioners now assert, the claims were atypical.

material, rather than evidence" (R. 238-239). They were "strictly not testimony" (R. 438). Apparently the Circuit Court of Appeals felt that findings based on such argumentation had no evidentiary value, for in appending the findings of fact to its opinion (162 F. (2d) at 670 *et seq.*) the Court omitted all findings based on such non-evidentiary matter.

The facts of respondents' employment are relatively simple. Respondents worked for petitioners as longshoremen in excess of 40 hours in many weeks. For handling general cargo[2] respondents were paid $1.25 for each hour worked between 8 a.m. and noon and between 1 p.m. and 5 p.m. Monday through Friday and between 8 a.m. and noon on Saturday. For all other time they were paid $1.875 an hour. In all cases these rates were paid regardless of the number of hours worked in the day or week (Find. 42, R. 614).

Respondents did 80% of their work during so-called overtime hours. Four of the twenty respondents never worked any "straight time". They worked "overtime" all of the time. One worked over 3,000 hours of "overtime" without one minute of "straight time". The details appear in the following chart (Find. 40, R. 613):

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[2] For simplicity we state actual rates of pay only for handling general cargo. For four of seven other types of cargo handled, however, the "overtime" rate was not 150% of the "straight time" rate (Find. 9, R. 595-597). Nor was additional compensation of 5 to 15 cents per hour for certain added responsibilities increased during "overtime" hours (Find. 11, R. 597-598).

Name	*Total Contract Straight Time Hours*	*Total Contract Overtime Hours*
Huron		
Blue	252.	206.
Dixon	8.	2,595.
Elliott	370.	214.5
Fleetwood	833.5	951.
Fuller	208.5	230.5
Johnson, J. J.	0.	3,210.
McGee	0.	2,598.5
Short	1,248.	1,009.
Steele	0.	1,747.5
Toppin	6.5	3,312.5
TOTAL HURON	2,926.5	16,074.5
Bay Ridge		
Aaron	52.	99.
Alston	318.5	850.
Brooks	28.	150.5
Carrington	298.5	344.5
Green	103.	576.5
Hendrix	44.	8.
Johnson A.	204.	250.
Roper	511.	1,158.
Stephens	0.	44.5
Tolbert	715.5	1,215.5
TOTAL BAY RIDGE	2,274.5	4,696.5
GRAND TOTAL	5,201.	20,771.

During most of the period in suit the petitioners required some longshore work around the clock, day in and day out (Find. 34, R. 610). When they worked around the clock, longshoremen found themselves at 8 a.m. working

for $1.25 an hour, the "straight time" rate, after having worked all night for $1.87½, the "overtime" rate. A man who thus worked "straight time" after 40 hours of night work in a given week suffered an actual reduction in his hourly rate instead of the increase required by the Fair Labor Standards Act (Finds. 43 (c) and (d), R. 615).

One of the petitioners hired some gangs specifically and exclusively for work at "overtime" hours and "overtime" rates (Find. 34, R. 610; also R. 176). Men employed in these night gangs never worked for the day rates, which petitioners assert were their regular rates of pay (Find. 43 (b), R. 615).

Nevertheless, the district court held that the higher rates for night work were not regular rates, mainly because a collective bargaining agreement labeled them "overtime" (Opinion, R. 582-591).

Night work has been higher paid than day work in the longshore industry since at least 1887 (Find. 30, R. 608). Night longshore work is so hazardous and undesirable that some men, other than respondents, refused even in war time to work nights (Find. 27, R. 604). But the 1938 contract, after enactment of the Fair Labor Standards Act, was the first to label the less desirable, or night, hours as "overtime" (Finds. 31, 33, R. 609).

The 1938 contract provided:[3]

> "3 (a) Straight time rate shall be paid for any work performed from 8 a.m. to 12 Noon and from

[3] In wilful violation of the Act the stevedore contracts in the Port of New York during the period in suit provided a basic or straight time workweek of 44 hours, while since 1940 the Act has limited the non-overtime workweek to 40 hours. The stevedore contractors always insisted that the 40 hour week "was not applicable to the steamship industry" (R. 194).

1 p.m. to 5 p.m., Monday to Friday, inclusive, and from 8 a.m. to 12 Noon Saturday.

(b) *All other time,* including meal hours and the Legal Holidays specified herein, *shall be considered overtime* and shall be paid for at the overtime rate." (Italics supplied.)

With a minor exception, however, no actual change in the manner of compensating longshoremen was made after passage of the Act from that which had prevailed for many years (Find. 33, R. 609-610).

While expressing concern lest it restrict the scope of collective bargaining, the District Court nevertheless found that:

> "The 'basic working day' and the 'basic working week' referred to in the Collective Agreement were not the working day or working week normally, regularly or usually worked by plaintiffs during the period in suit" (Find. 45, R. 615).

This was the basis, as it should have been, for the Circuit Court's remand.

ARGUMENT

I.

On the essential issue in this case, this Court has already ruled adversely to petitioners' contentions, and the decision of the Second Circuit was not in conflict with any decision of this Court.

The present case is another involving a form of "split-day" plan for payment of wages to workers, such as this Court has already ruled illegal (notwithstanding its incorporation in a collective labor agreement) in *Walling* v.

Helmerich & Payne, Inc., 323 U. S. 37, 40-41. The various versions of such plans present no additional novel, substantial or important question for determination not previously resolved by that decision. Thus review was denied here in *Walling* v. *Alaska Pacific Consolidated Mining Co.*, 152 F. (2d) 812, cert. den. 66 S. Ct. 960; *Robertson* v. *Alaska Gold Mining Co.*, 157 F. (2d) 876, cert. den. 91 L. Ed. 1181. See also *Walling* v. *Youngerman-Reynolds Hardwood Co., Inc.*, 325 U. S. 419, 423-424; *Walling* v. *Harnischfeger*, 325 U. S. 427, 430-431.

At the last term of this Court the appropriate disposition of cases of this character was again made abundantly clear on two separate occasions. See *149 Madison Avenue Corp.* v. *Asselta*, 331 U. S. 199, 205; cf. *Walling* v. *Halliburton Oil Well Cementing Co.*, 331 U. S. 17, 23. Referring in the latter to the earlier *Helmerich & Payne* decision, the Court said:

> "In those weeks in which an employee worked statutory overtime, he was paid at the contract 'overtime' rate for many straight-time hours and at the contract 'regular' rate for many overtime hours. Obviously, these prescribed rates were not actual regular and overtime rates, although so named in the plan. Consequently, as in Overnight Motor Co. v. Missel, 316 U. S. 572, we held that the regular rate was to be determined by *dividing the wages actually paid by* the hours actually worked."

And in the *149 Madison Ave.* case the Chief Justice repeated:

> "The payment of 'overtime' compensation for non-overtime work raises strong doubt as to the integrity of the hourly rate upon the basis of which the 'overtime' compensation is calculated."

In the instant case the lower court has found in these words (Find. 43 (b)-(d), R. 615):

"[1] A longshoreman who worked on general cargo in excess of 40 hours a week, all of his working hours being 'overtime' hours, was paid the 'overtime' hourly rate of $1.87½ an hour, for all hours both within and beyond 40.

[2] A longshoreman who worked on general cargo 40 hours or more during 'overtime' hours, and also worked on Saturday from 8 a.m. to 12 noon during the same workweek, received $1.87½, the 'overtime hourly rate', for the 'overtime' hours, and $1.25, the 'straight time hourly rate', for the Saturday hours.

[3] A longshoreman who worked on general cargo for eight hours on Monday, from 8 a.m. to 5 p.m., and ten 'overtime' hours during each of the following four days and also on Saturdays from 8 a.m. to noon, received compensation at the 'straight time' rate for Monday and Saturday, and the 'overtime' rate for the other hours.

[4] A longshoreman who worked on general cargo for 40 hours or less during the week, all of these hours being within the 'overtime' classification, was paid the 'overtime hourly rate' of $1.87½ per hour."

How could the "regular rate" of pay for longshoremen who were specially hired for night duty have been the lower, or day-time, rate which they never received? As this Court observed in the *Harnischfeger* case, at pp. 430-431:

> "To compute overtime compensation from the *lower and unreceived rate* is not only unrealistic but is destructive of the legislative intent." (Italics supplied.)

Thus, the present case falls squarely within clearly indicated principles established by numerous decisions of this Court.

II.

There was no conflict between the Second Circuit's rejection of petitioners' contentions and the decision of any other Circuit Court of Appeals.

All the decisions in other Circuits on the issue here are in accord with the Second Circuit's decision. See *Cabunac* v. *Natl. Terminals Corp.*, 139 F. (2d) 853 (C. C. A. 7th), affg. *Intl. Longshoremen's Assn.* v. *Natl. Terminals Corp.*, 50 F. Supp. 26 (E. D. Wis.); *Ferrer* v. *Waterman S. S. Corp.*, 70 F. Supp. 1 (D. P. R.), docket returned to the District Court on the Government's request during pendency of appeal in the First Circuit; *Roland Electrical Co.* v. *Black*, 7 W. H. Cases 167 (C. C. A. 4th, Aug. 12, 1947).

The Second Circuit, consistently with these decisions, has held that (1) the payments at "overtime" hourly rates pursuant to the longshore agreements were not overtime under the Act; (2) these payments were but the higher rates paid for hours normally and regularly worked at undesirable times of day and days of the week; (3) payments at these higher rates were payments at the employees' "regular rate of pay" for such hours, within the meaning of Section 7.

III.

The Second Circuit, as directed in the earlier decisions of this Court, properly accorded weight to the Administrator's opinion that payments at the higher rate provided under the longshore agreements for work at undesirable hours are not overtime within the meaning of the Act.

As petitioner has conceded, the Administrator of the Wage and Hour Division "believes that * * * the decision below is correct" (Pet., p. 25).

The trial court found here that there has been nothing regular about the hours of work of longshore employees in the Port of New York and of the plaintiffs in particular (Find. 14-15, 598-599); that they have been called to work in gangs, days or nights, or carried from day work into night work, without regard to any regular or normal pattern but solely dependent upon the uncertainties of maritime, shipping and weather conditions and the character of ship and overland cargo arrivals, with the use of the "shape" as a shift hiring device (Find. 14, R. 598-599; Find. 19, R. 501; Find. 34, 36, R. 610); that they are required by their collective agreement to be available for work at any time of the day or night and Saturday afternoon, Sunday and holidays as they may be needed (Find. 20, R. 601); and that the so-called "basic working day" and "basic working week" established by the contract are fictions and "not the working day or working week normally, regularly and usually worked by plaintiffs" (Find. 45, R. 615).

These were the same considerations which led to the Administrator's opinion to the stevedore industry (Pl. Ex.

18, R. 559-561) that the so-called "overtime" rate established in the longshore agreements is "simply a higher rate of pay to the employee for working during inconvenient hours". The Second Circuit, in relying on the Administrator's opinions, which the trial court had ignored, followed the direction of this Court that such opinions are to be accorded appropriate weight. See *Overnight Motor Transportation Co.* v. *Missel*, 316 U. S. 572, 580, note 17; *Skidmore* v. *Swift & Co.*, 323 U. S. 134, 139-140.

IV.

There is no occasion to review the decision of the Second Circuit here because of any particular importance or novelty of the question involved.

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be denied.

Respectfully submitted,

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